

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SCOTT MURPHREE)	
Claimant)	
VS.)	
)	
STEVE RUGG DRYWALL CONSTRUCTION)	Docket No. 166,809
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	

ORDER

ON the 4th day of November, 1993, the application of the claimant and the application of the respondent for review by the Workers Compensation Appeals Board of an award entered by Administrative Law Judge George R. Robertson on October 13, 1993, came on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Randy S. Stalcup, of Wichita, Kansas. Respondent and insurance carrier appeared by their attorney, David M. Druten, of Lenexa, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the award of the Administrative Law Judge, except for Item No. 1 in the record of the Administrative Law Judge, the transcript of proceedings dated April 11, 1992, is incorrect and should be changed to August 11, 1992.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the award of the Administrative Law Judge.

ISSUES

- (1) Did claimant meet with personal injury by accident that arose out of and in the course of his employment?
- (2) If so, what is the nature and extent of claimant's disability?
- (3) Is claimant entitled to future medical benefits?

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact:

- (1) The claimant injured his right elbow on a scaffold when the ceiling came down while hanging sheetrock for the respondent in December of 1990.
- (2) The claimant also developed bilateral carpal tunnel syndrome over a four to five month period beginning in January of 1992, from the repetitive work requirements of a sheetrocker while employed by the respondent.
- (3) The claimant notified his employer, Steve Rugg, that he hurt his right elbow two weeks after the accident and he further notified his employer on different occasions, the first time in March of 1992, that his hands were numb and were progressively getting worse over a four to five month period.
- (4) Mr. Rugg did not send the claimant to a doctor, but he did tell the claimant to go ahead and go to a doctor in May of 1992, because of his hand and elbow complaints.
- (5) On May 27, 1992, the claimant went to see Dr. Carl L. Fugate, a family practitioner in Beloit, Kansas, for treatment of his right elbow as the elbow was really bothering him at this time. Dr. Fugate found decreased interosseous strength and some decreased sensation along the claimant's little finger and recommended for the claimant to see a Dr. Jones W. Neumann, neurologist, for nerve conductive tests.
- (6) The nerve conductive test showed right ulnar nerve injury and bilateral carpal tunnel syndrome. Dr. Fugate then referred the claimant to Dr. Martin B. Klenda, a general surgeon, for treatment and Dr. Klenda first saw the claimant on June 29, 1993.
- (7) Dr. Martin Klenda performed a right carpal tunnel release on the claimant on July 1, 1992, and a left carpal tunnel release on July 23, 1992.
- (8) Dr. Klenda dismissed the patient from his treatment on October 2, 1992, to return as needed. Dr. Klenda found that the claimant was totally asymptomatic relative to his carpal tunnel, having no sensory deficit or pain. Claimant did complain of numbness in his fifth finger bilaterally and Dr. Klenda suggested he see a Dr. Grelinger in Wichita, Kansas, for another opinion relative to his apparent ulnar nerve contusion.
- (9) Dr. Klenda, when asked about rating patients for permanent functional impairment stated that he didn't like to get into ratings but understood that most ratings for the claimant should be in the range two to four percent. He further testified that he had very little familiarity with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, and he didn't like to rate people as he was not an expert. He would just as soon leave the rating up to someone who had such expertise.
- (10) The claimant was released by Dr. Klenda without restrictions because the claimant didn't report any problems with his hands on October 2, 1992, the date of his last visit.
- (11) The procedure that Dr. Klenda follows to determine whether a patient has any restrictions following the carpal tunnel release is by what the patient states to him. If his fingers do not hurt or the fingers are not numb, then that's good enough for Dr. Klenda.

(12) The claimant was examined and evaluated by Daniel D. Zimmerman, M.D., in Kansas City, Kansas, on October 21, 1992, at the request of the claimant's attorney. Dr. Zimmerman has had a number of years of extensive experience in examining and evaluating patients for disability ratings, in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised.

(13) Dr. Zimmerman took a history from the claimant, performed a physical examination including X-rays, and made the following findings:

- a. The claimant's bilateral carpal tunnel syndrome and right elbow ulnar nerve entrapment were related to the claimant's work activities when he was employed by the respondent.
- b. In accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, using the combined value chart and considering the residuals of the bilateral carpal tunnel syndrome and ulnar nerve entrapment, the claimant's permanent partial functional impairment of the whole body is 17 percent.
- c. The claimant would need nonsteroidal anti-inflammatory medication in the future and his medial epicondylitis of his right elbow would possibly benefit from steroid and local anesthetic injections.
- d. Restrictions of not lifting more than 20 pounds on an occasional basis, not more than ten pounds on a frequent basis were imposed. The claimant's use of his hands and wrists were restricted from frequent flexion, extension, twisting, torquing, vibrating and hammering activities.

(14) On the date of the regular hearing, April 15, 1993, the claimant was attending Kansas Wesleyan University in Salina, Kansas, taking 16 hours and was in his second semester of college work.

(15) Since Dr. Klenda released the claimant from treatment and to return to work on December 4, 1992, the claimant has looked for employment, but as of the date of the regular hearing of April 15, 1993, he had not been employed in any capacity.

(16) The claimant is a high school graduate and his work experience prior to his injuries has been generally limited to skilled and unskilled manual labor.

(17) An application for hearing was filed by the claimant in this matter in the Director's office on July 2, 1992.

(18) Jerry D. Hardin, a personnel specialist, with a Masters of Science degree, testified at the request of the claimant as to claimant's loss of ability to perform work in the open labor market and loss of his ability to earn comparable wages. In rendering his opinion, Mr. Hardin took into consideration the claimant's education, training, experience and capacity for rehabilitation.

(19) Without an objection being imposed by the respondent, Mr. Hardin testified that based on his review of the claimant's medical records, personal interview of the claimant, his training, education and background, and physical restrictions imposed by Dr. Zimmerman, his personal evaluation and opinion of the claimant's ability to perform work in the open labor market has been reduced by 85 to 90 percent because of his work related injuries.

(20) Mr. Hardin further testified, again without an objection imposed by the respondent, that the claimant's ability to earn comparable wages has been reduced by 37 percent because of his work related injuries. Mr. Hardin used a post-injury wage at \$240 per week and a pre-injury wage of \$380 per week to arrive at this percentage.

(21) Mr. Hardin was also asked to calculate the claimant's wage loss based on a pre-injury wage of \$339 per week and a post-injury wage of \$240 per week. His opinion based on these weekly figures was a wage loss of 29 percent.

CONCLUSIONS OF LAW

(1) The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse

compensation, or to increase or to diminish any award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53. (b)(1).

(2) In a workers compensation case, the claimant has the burden of proof to establish his right to an award of compensation and to prove the various conditions on which the claimant's right depends. K.S.A. 1992 Supp. 44-501(a).

(3) In the instant case, the claimant has established by credible testimony that in December of 1991, and over a four to five month period commencing in January of 1992, he suffered a personal injury to his right elbow and bilateral carpal tunnel syndrome by accident arising out of and in the course of his employment with the respondent.

(4) The medical evidence presented through the testimony of Dr. Klenda and Dr. Zimmerman proves that the injuries the claimant sustained are consistent with the job requirements the claimant performed as a sheetrocker when he was employed by the respondent.

(5) The parties to this case stipulated that timely written claim was received in reference to the bilateral carpal tunnel injuries, however, the issue as to whether or not timely written claim was filed in regard to the elbow injury, which occurred in December of 1991, has been questioned by the respondent.

(6) Respondent was notified by the claimant in May of 1992, that he was going to Dr. Fugate because of his increasing problem with his right elbow. This medical treatment being authorized would make the application for hearing, which was filed by the claimant on July 1, 1991, as a timely filing of a claim by the claimant for the elbow injury. In order to maintain a claim for compensation under the Workers Compensation Act, a written claim for compensation has to be served upon the employer within two-hundred (200) days after the date of the last payment of compensation. K.S.A. 44-520a. Compensation includes payment of medical expenses by the employer. Dexter v. Wilde Tool Co., 188 Kan. 816, 818, 365 P.2d 1092 (1961).

(7) The Administrative Law Judge in this case awarded the claimant a ten percent functional impairment and concluded that the claimant had failed to meet his burden of proving work disability.

(8) The respondent sets forth arguments that the claimant has no functional permanent impairment and the claimant argues that he has a permanent partial general bodily disability based on work disability in the amount of 90 percent.

(9) "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury." K.S.A. 1992 Supp. 44-510e(a).

(10) The claimant, in the instant case, should receive nothing less than his functional impairment rating, established by the testimony of Dr. Klenda of two to four percent, and Dr. Zimmerman of 17 percent to the body as a whole.

(11) The Administrative Law Judge gives little weight to Dr. Zimmerman's testimony, as an examining physician. In contrast, he gives overwhelming weight to the treating physician, Dr. Klenda.

(12) The Appeals Board, however, considers Dr. Zimmerman's testimony as credible in reference to assessing functional impairment and also credible in assessing permanent restrictions for the claimant.

(13) Dr. Klenda's testimony as to his opinion of the claimant's functional impairment is given little weight because the doctor admits he does not know how to rate patients for functional impairment. Additionally, without objective testing, he goes on to testify that the claimant is asymptomatic and he has no restrictions because the claimant did not tell Dr. Klenda he had any problems with his hands as a result of the bilateral carpal tunnel release operations.

(14) Since the Appeals Board is giving greater credibility to the testimony of Dr. Zimmerman in regard to functional impairment and restrictions, then consideration of evidence presented by Jerry Hardin, personnel specialist, is also determined as credible and is given weight in deciding this case.

(15) If the claimant is entitled to work disability, then the work disability should be determined upon a two-prong test. This test for determining permanent partial general disability is the extent, expressed as a percentage, to which the ability to perform in the open labor market has been reduced and the ability of the worker to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). Hughes does not mandate that a court use a specific formula to arrive at the extent of permanent disability; it does require consideration of the two factors stated above when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App 2nd 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(16) In this case, the claimant presented uncontroverted evidence through the testimony of Jerry Hardin, personnel specialist, that the claimant's ability to perform work in the open labor market has been reduced by 85 to 90 percent and his ability to earn comparable wages has been reduced by 29 percent when using a pre-injury wage of \$339. However, the parties stipulated that the average weekly wage of the claimant for purposes of this case is \$333.89. Using \$333.89 as a pre-injury wage, then the claimant's ability to earn comparable wage has been reduced by 28 percent.

(17) The Appeals Board having considered both the claimant's loss of ability to perform work and earn comparable wages in the open labor market, in addition to the whole record in this case, finds and concludes by giving greater weight to the loss of the claimant's ability to earn comparable wage that the claimant is entitled to a 28 percent permanent partial general disability award based on work disability. The Appeals Board, as the trier of fact, has the ultimate decision concerning the extent and nature of the disability, and such decision must be based on the evidence presented. However, the trier of fact is not bound by the medical evidence presented in the case and has the responsibility of making its own determination. The trier of fact's function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App 2nd 782, 785-786, 817 P.2d 212 (1991).

(18) The Appeals Board assesses the costs of this action to the respondent.

(19) The Appeals Board further finds that based upon the testimony of Dr. Zimmerman and the claimant, future medical should be provided by the respondent upon application only.

(20) Medical expenses in the amount of \$4,370.50 have been paid in this case by the respondent.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated October 13, 1993, is increased with respect to the award of compensation as it relates to the percent of permanent partial general disability and such award of compensation is hereby entered in favor of the claimant, Scott Murphree, and against the respondent, Steve Rugg Drywall Construction, and the insurance carrier, Aetna Casualty and Surety Company.

The claimant is entitled to 23 weeks of temporary total disability at the rate of \$222.60 per week or \$5,119.80 followed by 392 weeks at \$62.33 per week or \$24,433.36 for a 28 percent permanent partial general bodily disability making a total award of \$29,553.16.

As of October 10, 1993, there would be due in owing to the claimant 23 weeks temporary total compensation at \$222.60 per week in the sum of \$5,119.80 plus 61 weeks permanent partial compensation at \$62.33 per week in the sum of \$3,802.13 for a total due in owing of \$8,921.93, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$20,631.23 shall be paid at \$62.33 per week for 331 weeks or until further order of the Director.

FURTHER AWARD is made that claimant is entitled to medical expenses, and any unauthorized medical expenses up to \$350.

Future medical will be considered upon proper application.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay cost of the transcripts as follows:

OWENS, BRAKE & ASSOCIATES

Preliminary Hearing Transcript	
Dated August 11, 1992	\$ 186.00
Regular Hearing Transcript	
Dated April 15, 1993	\$ 114.00
Deposition of Dr. Martin Klenda	
Dated July 20, 1993	\$ 199.05
Deposition of Steve Rugg	
Dated July 20, 1993	\$ 155.60

GENE DOLGINOFF ASSOCIATES, LTD.

Deposition of Dr. Daniel Zimmerman	
Dated April 2, 1993	\$ 358.80

SATTERFIELD REPORTING SERVICES

Deposition of Jerry D. Hardin	
Dated April 16, 1993	\$ 167.80

IT IS SO ORDERED.

Dated this ____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Randy S. Stalcup, 2831 E. Central, Wichita, Kansas 67214
David M. Druten, P.O. Box 14548, Lenexa, Kansas 66285-4548
George R. Robertson, Administrative Law Judge
George Gomez, Director